The Great Writ—A Reflection of Societal Change

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I. INTRODUCTION

Much has been written concerning habeas corpus *ad subjiciendum*, the Great Writ, a basic safeguard against unlawful detention.[1] This Article traces the highlights in the expansion and contraction of federal habeas corpus and attempts to show how social change has influenced the reach of the writ.

Although the development of federal habeas corpus law seemingly reflects changes in the personality of the Supreme Court over time, societal attitudes of each period in our history often underlie both the Court's pronouncements and the actions of Congress.[2] Alphaeus Thomas Mason observed several years ago that "[j]udicial decisions range widely under the impact of various pressures. They [do not] represent . . . a soulless, mechanical choice of alternatives."[3] More recently, former Justice Potter Stewart, in an interview, expressed the view that critics and supporters of the Supreme Court sometimes "attribute . . . too much"[4] to it; that the decisions of the Court merely "have reflected the changes in American society."[5] Even before Roscoe Pound's admonition in 1906 against mechanical jurisprudence,[6] dynamic episodes in legal development had occurred in which the social environment of the time shaped the course of the law. This Article explores this phenomenon in the context of the growth and decline of federal habeas corpus.

II. THE COLONIAL ERA

William Penn and William Meade were tried in 1670 in Old Bailey, London, for participating in a Quaker worship. They could not possibly have imagined the impact that their jury trial would ultimately have on the writ of habeas corpus in the still unformed American nation. The repeated refusal of Edward Bushell, foreman of the jury, and his fellow jurors to permit the court to dictate a guilty verdict led to the jurors' imprisonment. Eight of the jurors paid fines to purchase freedom; Bushell rejected this form of release and

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1. This Article is concerned with custody arising out of criminal conviction and sentence by a court of law. Detention can also occur in many other contexts, in which the scope of judicial inquiry may differ.

2. In Fay v. Noia, 372 U.S. 391 (1963), Justice Brennan noted that "[a]ll the significant statutory changes in the federal writ have been prompted by grave political crises." *Id.* at 401 n.9.

3. Mason, *Free Government's Balance Wheel*, WILSON Q., Spring 1977, at 93, 94.

4. *Justice Potter Stewart: An Interview Reflecting on the Court*, NAT'L L.J., July 12, 1982, at 11, 21.

5. *Id.*

6. R. Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice* (address to the American Bar Association, Aug. 29, 1906), *reprinted in* 35 F.R.D. 273 (1964).

eventually won his liberty, after many weeks of incarceration,[7] by the first writ of habeas corpus issued by a court of common pleas.[8] England's most noted lawyers argued in Bushell's behalf before the Lord Chief Justice of England and his eleven associates, who decided that jurors must be free to return verdicts upon the evidence, uncoerced by the court.[9]

Penn published a complete account of these events[10] that received noteworthy attention in the American colonies.[11] By the time the federal constitution was adopted, many colonists had claimed a common-law right to the writ of habeas corpus.[12] This claim received legitimation in colonial charters and later in state legislation that adopted in substance the English Habeas Corpus Act of 1679.[13] Some of the colonies further legitimized the writ by adopting various constitutional provisions either explicitly guaranteeing the availability of the writ or prohibiting its suspension.[14]

Nonetheless, the inclusion of a habeas corpus provision in the federal constitution provoked considerable debate.[15] Although declining to incorporate in the Constitution an affirmative guarantee of the writ, the convention delegates adopted a provision barring the writ's suspension.[16] Considerable historical basis demonstrated the need for that suspension clause: the English Parliament had frequently suspended the writ during the seventeenth and eighteenth centuries, thereby permitting confinement without indictment, bail, or other judicial process.[17] Parliament suspended even the historic Habeas Corpus Act, adopted in 1679, because of conspiracies against the King in 1688 and 1696.[18] A number of suspensions in the eighteenth century followed, including one prompted by the American revolution.[19] It is highly likely that these events had left their imprint in the minds of the colonists. As

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7. Bushell's Case, 6 Howell's State Trials 999, 124 Eng. Rep. 1006 (C.P. 1670); *see* H. WILDES, WILLIAM PENN 65–67 (1974).

8. Lehman, *Gentlemen of the Jury*, LIBERTY, Jan.-Feb. 1982, at 20, 22.

9. Bushell's Case, 6 Howell's State Trials 999, 124 Eng. Rep. 1006 (C.P. 1670); *see* H. FANTEL, WILLIAM PENN: APOSTLE OF DISSENT 127–28 (1974).

10. *See* Harvey, *Penn, The Religious Leader*, in TRIBUTES TO WILLIAM W. PENN: A TERCENTENARY RECORD, 1644–1944, at 35 (1946). *See generally* W. PENN, THE GREAT CASE OF LIBERTY OF CONSCIENCE ONCE MORE BRIEFLY DEBATED (1670).

11. *See, e.g.*, White, *Penn, the Statesman*, in TRIBUTES TO WILLIAM W. PENN: A TERCENTENARY RECORD, 1644–1944, at 50 (1946).

12. *See* W. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 95–125 (1980); *see also* Fay v. Noia, 372 U.S. 391, 405 (1963).

13. English Habeas Corpus Act, 1679, 31 Car. 2, ch. 2; *see* W. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 95–125 (1980).

14. For example, the Massachusetts Constitution contained an affirmative provision for the writ and also barred its suspension except on "the most urgent and pressing occasions." MASS. CONST. ch. 6, art. VII, § 98. The New Hampshire Constitution of 1784 contained similar provisions, N.H. CONST. art. 91, and the Georgia Constitution also incorporated principles of habeas corpus, GA. CONST. art. I, § 1, ¶ XII. *See* Collings, *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?*, 40 CALIF. L. REV. 335, 341 n.34 (1952).

15. *See* W. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 128–31 (1980).

16. "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2.

17. *See* Collings, *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?*, 40 CALIF. L. REV. 335, 339 (1952).

18. *Id.*

19. *Id.* at 329 n.26.

a result the delegates at the Constitutional Convention were concerned about the possibility of the central government's suspending state habeas corpus over federal prisoners.[20] This concern of several of the colonies and a number of the delegates to the Constitutional Convention, especially Charles Pinkney, also led to the enactment of a specific provision in section 14 of the Judiciary Act of 1789, affirmatively granting courts of the United States power to issue writs of habeas corpus.[21]

Although Thomas Jefferson criticized the framers of the Constitution for not specifically setting forth affirmative habeas corpus provisions,[22] ironically, Jefferson's administration made the first effort in the new Republic to suspend the writ. Jefferson had committed himself to destroying Aaron Burr's political career, and suspension of the writ became part of the plan. Jefferson desired to prevent issuance of the writ in behalf of Dr. Justus E. Bollman and Samuel Swartwout, two dispatch-bearers for Burr who were charged with treason, as, ultimately, was Burr himself.[23] Bollman and Swartwout had been seized in New Orleans at the direction of General Wilkinson, commander of the Army of the United States. They were denied counsel and access to the courts. Pursuant to Wilkinson's orders, Bollman and Swartwout were transported on board a warship to Washington, D.C., for delivery to the President. Upon arrival in the capital they remained in a military prison while Congress debated the suspension of the habeas corpus writ.[24] Chief Justice Marshall finally released them on such a writ.[25]

Except for this episode, the writ enjoyed an uneventful history during this period. The great concerns of Americans were agriculture, commerce, and perceived injustices engendered within the states pertaining to contract and property rights.[26]

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20. After carefully analyzing contemporary commentary on the suspension clause, as well as considering its location in the Constitution, the relevant history, and the records of the state constitutional conventions, William F. Duker argued persuasively "that the framers intended the clause only to restrict Congressional power to suspend state habeas for federal prisoners." W. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 126 (1980).

21. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat 73, 81. Section 14 also provided that Justices of the Supreme Court, as well as judges of the district courts, shall have the power to grant the writ for the purpose of inquiring into the cause of the commitment "*[p]rovided*, That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into a court to testify." *Id.* at 82.

22. *See* W. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 133 n.52 (1980) (citing 5 WRITINGS OF THOMAS JEFFERSON 493 (Ford ed. 1904)).

23. *See* 3 A. BEVERIDGE, THE LIFE OF JOHN MARSHALL 343–52 (1919).

24. In the House debate over the suspension, John Randolph vigorously criticized the attempt to suspend the writ, arguing that the Declaration of Independence had assailed the kind of wrongs "suffered by Bollman and Swartwout 'as one of the grievances imposed by the British government on the colonies. Now, it is done under the Constitution,' exclaimed Randolph, 'and under a republican administration, and men are transported without the color of law, nearly as far as across the Atlantic.' " *Id.* at 360 (quoting 9 ANNALS OF CONG. 537–38 (1807)).

25. *Ex parte* Bollman and *Ex parte* Swartwout, 8 U.S. (4 Cranch) 75 (1807).

26. *See* H. HOCKETT, POLITICAL AND SOCIAL HISTORY OF THE UNITED STATES, 1492–1828, at 177–78 (1927); *see also* J.F. JAMESON, THE AMERICAN REVOLUTION CONSIDERED AS A SOCIAL MOVEMENT 52–64 (1957).

For much of the first century following the enactment of the Judiciary Act of 1789, federal habeas corpus was limited to petitions filed by persons in the custody of the United States. In 1845, in *Ex parte Dorr*,[27] the Court ruled that it lacked the power to issue the writ to a prisoner under sentence of a state court. The Court described the proviso in section 14 as "unambiguous" in placing "beyond the power of federal courts and judges [individuals] in custody under the authority of a state."[28] Even when a federal prisoner brought the application for a writ of habeas corpus, the Supreme Court would never inquire into the underlying indictment or into the justness of the conviction, but would look only into the very narrow issue whether the convicting court had jurisdiction.[29] The federal courts held that habeas corpus afforded no relief to an individual incarcerated pursuant to a judgment of a court of competent jurisdiction.[30]

Although the Judiciary Act of 1789 gave federal courts the power to issue writs of habeas corpus, unfortunately the Act failed to define the term "habeas corpus" and to set forth the procedure for granting the writ. The Supreme Court ultimately construed the habeas provisions of the Act according to the common-law writ. In *Ex parte Bollman*[31] Chief Justice Marshall observed that although the power to issue the writ depended on statute, "for the meaning of the term *habeas corpus*, resort may unquestionably be had to the common law."[32]

Inevitably, our dual system of government was bound to produce conflict between the states and the federal government, and in 1833 Congress found itself compelled to expand the writ because of a jurisdictional conflict with state courts. Federal marshals attempting to enforce a federal tariff, the so-called "Tariff of Abominations," underwent the humiliating and unpleasant experience of imprisonment under orders of state courts in the South.[33] Congress responded by making habeas corpus available to federal officers in state custody for acts committed in furtherance of federal law.[34]

Congress again expanded the reach of the writ in 1842, in response to international tensions emanating from the Canadian rebellion in 1837–1838.[35] These tensions developed when New York State indicted a British citizen for the destruction of an American-owned ship that had been lending support to rebellious forces in Canada.[36] When Britain called upon our federal government for the immediate release of the prisoner, the United States responded

27. 44 U.S. (3 How.) 103 (1845).
28. *Id.* at 105.
29. *See, e.g.*, *Ex parte* Watkins, 28 U.S. (3 Pet.) 193 (1830).
30. *See, e.g.*, *id.* at 202–03; *Ex parte* Kearney, 20 U.S. (7 Wheat.) 38 (1822).
31. 8 U.S. (4 Cranch) 75 (1807).
32. *Id.* at 93–94.
33. Note, *The Freedom Writ—The Expanding Use of Federal Habeas Corpus*, 61 HARV. L. REV. 657, 658 (1948).
34. Act of Mar. 2, 1833, ch. 57, § 7, 4 Stat. 632, 634 (current version at 28 U.S.C. § 2241(c)(2) (1976)).
35. Act of Aug. 29, 1842, ch. 257, 5 Stat. 539.
36. W. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 188 (1980).

that its interposition would be improper because the alleged offense had been committed within the jurisdiction of the State of New York.[37] Congress' subsequent extension of the writ made it available to subjects or citizens of foreign governments who were detained under state or federal authority for acts done pursuant to the law of a foreign sovereign.

III. The Reconstruction Period

Perhaps the most dramatic and significant development in the federal writ of habeas corpus came with congressional enactment of the Act of February 5, 1867.[38] In this legislation Congress markedly extended the historic boundaries of the writ by making it available to "any person . . . restrained of his or her liberty in violation of the constitution . . . or law of the United States."[39] The Act thereby overruled *Ex parte Dorr*[40] and significantly extended the power to issue the writ in behalf of state prisoners. The Act also made a major change in habeas corpus procedure by providing that petititoners for the writ "may deny any of the material facts set forth in the return, or may allege any fact."[41] Thus, the habeas court was now empowered to conduct an inquiry into the facts underlying the detention and was no longer limited to bare legal review. These wide-reaching changes ultimately became the basis for the development of modern federal habeas law, although neither their full impact nor their potential was felt until the twentieth century.

When one considers the suspicion with which much of the citizenry during the colonial period viewed the doctrine of federalism, and the tensions that had already surfaced between the states and the federal government, the Act of 1867 seems a startling piece of legislation. The Act, however, did not suddenly evolve in a flash of brilliance, as Minerva sprung forth from the head of Jupiter. Its genesis lay in the dramatic and extensive changes wrought in the South by the Civil War and the Reconstruction Acts. Despite ratification of the thirteenth amendment in 1865,[42] some of the state legislatures that voted for the amendment took measures to undermine it in the years that

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37. *Id.* at 188–89.

38. Ch. 28, 14 Stat. 385. This Act provided *inter alia* that the federal courts and judges

> in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States . . . . The petitioner may deny any of the material facts set forth in the return, or may allege any fact to show that the detention is in contravention of the constitution or laws of the United States, which allegations or denials should be on oath. . . . The said court or judge shall proceed in a summary way to determine the facts of the case, by hearing testimony and the arguments of the parties interested, and if it shall appear that the petitioner is deprived of his or her liberty in contravention of the laws of the United States, he or she shall forthwith be discharged and set at liberty.

Id. at 385–86.

39. *See id.*

40. 44 U.S. (3 How.) 103 (1845). *See supra* text accompanying note 27.

41. *See supra* note 36.

42. U.S. CONST. amend. XIII, § 1 provides: "Neither slavery nor involuntary servitude . . . shall exist within the United States . . . ."

followed. Racial conflicts continued, and "the South did not fear to show that in spirit it was neither broken nor contrite."[43]

Congressional investigations at the time[44] revealed that "despite a theoretical improvement in legal status, Negroes remained virtually unprotected by State criminal processes."[45] After taking extensive testimony, the Joint Congressional Committee on Reconstruction reported in the winter of 1866 that emancipated slaves were subjected to acts of "cruelty, oppression and murder, which the local authorities were at no pains to prevent or punish."[46]

Addressing the Senate one year after the Act was passed, Senator Trumbull, Chairman of the Senate Judiciary Committee, commented on the purpose of the Act:

> The act of 1867 was not the first act which authorized writs of *habeas corpus* to be issued by the United States courts. The act of 1789 authorized the issuing of all such writs in cases where persons were deprived of their liberty under authority or color of authority of the United States. Why, then, was the act of 1867 passed? It was passed to authorize writs of *habeas corpus* to issue in cases where persons were deprived of their liberty under State laws or pretended State laws. It was the object of the act of 1867 to confer jurisdiction on the United States courts in cases not before provided for, and it was to meet a class of cases which was arising in the rebel States, where, under pretense of certain State laws, men made free by the Constitution of the United States were virtually being enslaved, and it was also applicable to cases in the State of Maryland where, under an apprentice law, freedmen were being subjected to a species of bondage. The object was to authorize a *habeas corpus* in those cases to issue from the United States courts, and to be taken on appeal to the Supreme Court.[47]

Senator Trumbull had reported to the Senate in July 1866 on House Bill No. 605.[48] He explained that the Judiciary Act of 1789 had limited the habeas corpus jurisdiction of the United States courts to persons who were held under United States laws. Discussing the purpose of the proposed Act, Senator Trumbull emphasized:

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43. J. HICKS, THE AMERICAN NATION 21 (3d ed. 1955).

44. On January 8, 1866, Chairman Wilson of the House Judiciary Committee introduced a bill to secure the habeas corpus writ to persons held in slavery or involuntary servitude. Wilson's bill was referred to the Judiciary Committee with comment from Representative Smith stressing the "great importance" of the measure to many persons in his state. CONG. GLOBE, 39th Cong., 1st Sess. 135 (1866). Although this bill was never reported out of the Committee, it does reflect some of the social and political motivations in Congress that culminated in the passage of the Act of 1867. *See* Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 31, 34 n.17 (1965).

45. U.S. COMMISSION ON CIVIL RIGHTS, LAW ENFORCEMENT: A REPORT ON EQUAL PROTECTION IN THE SOUTH 7 (1965).

46. *Id.* (quoting JOINT COMMITTEE ON RECONSTRUCTION, REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, H.R. REP. NO. 30, 39th Cong., 1st Sess. vii, xvii (1866)).

47. CONG. GLOBE, 40th Cong., 2d Sess. 2096 (1868).

48. Senator Johnson was concerned that the language of House Bill 605 would allow a federal judge in one jurisdiction to issue a writ of habeas corpus to a party in another jurisdiction. As a result Senator Trumbull suggested an amendment to the Bill that restricted courts to issue writs of habeas corpus "within their respective jurisdictions." CONG. GLOBE, 39th Cong., 2d Sess. 790 (1867). The Bill was passed into law with this amendment. *See* Act of Feb. 5, 1867, ch. 28, 14 Stat. 385.

> Now, a person might be held under a State law in violation of the Constitution and laws of the United States, and he ought to have in such case the benefit of the writ, and we agree that he ought to have recourse to United States courts to show that he was illegally imprisoned in violation of the Constitution or laws of the United States.[49]

In a debate several months later in the Senate, Senator Johnson pointed out the breadth of the change:

> Any man who may be imprisoned in any part of the United States may be brought by this writ issued by a district judge of the United States farthest from the place of imprisonment. I think that is exceedingly inconvenient, embarrassing, and expensive and I do not see the necessity for it. I do not see why the authority should not be limited to the circuit judge of the circuit where the party is imprisoned, or at least the district judge within the same circuit.[50]

Intentionally or not, the language was broad enough to give the federal courts jurisdiction over all kinds of state prisoners, not merely federal agents or foreign representatives detained by state authorities. Representative Lawrence of Ohio, proponent of the Bill, characterized it on the floor of the House as "a bill of the largest liberty."[51] In view of the objectives of the Act, it is difficult to conceive how it could accomplish its purposes unless it enabled petitioners to seek habeas relief in federal courts should they be incarcerated or convicted of crime by states resisting the enforcement of the thirteenth amendment or the Reconstruction Acts.[52] In this climate Congress had little difficulty in enacting a habeas corpus statute that gave the federal courts broad jurisdiction.[53]

Within a few months after the passage of the Act, the Supreme Court applied it in *Ex parte McCardle*.[54] In affirming the habeas jurisdiction of the Supreme Court, Chief Justice Chase characterized the scope of the Act in these words: "This legislation is of the most comprehensive character. It brings within the *habeas corpus* jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties, or laws. It is impossible to widen this jurisdiction."[55]

Almost a century later, when the scope of the writ reached the zenith of

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49. CONG. GLOBE, 39th Cong., 1st Sess. 4229 (1866).

50. *Id.*, 2d Sess. 730 (1867).

51. *Id.*, 1st Sess. 4151 (1866).

52. Professor Lewis Mayers argues strenuously that the internal evidence in the drafting of the statute and the available contemporary data provide no foundation for the Supreme Court's implication in Fay v. Noia, 372 U.S. 391, 410 (1963), that the 1867 Act was also aimed at implementing the fourteenth amendment. Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 31, 55–57 (1965). The Act was passed prior to the fourteenth amendment.

53. In the following year Congress repealed the portion of the Act of 1867 that empowered the Supreme Court to hear appeals from the denial of the writ by lower federal courts. *See infra* note 55.

54. 73 U.S. (6 Wall.) 318 (1867).

55. *Id.* at 325–26. After this decision, and while the appeal was pending before the Supreme Court, Congress passed legislation withdrawing the Court's appellate jurisdiction over habeas cases. Act of Mar. 27, 1868, ch. 34, 15 Stat. 44; *see also Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1868).

its expansion, Justice Brennan looked back at the Act of 1867 and described it as

> designed to furnish a method additional to and independent of direct Supreme Court review of state court decisions for the vindication of the new constitutional guarantees. . . . The elaborate provisions in the Act for taking testimony and trying the facts anew in habeas hearings lend support to this conclusion, as does the legislative history . . . .[56]

Despite the expansion of habeas corpus jurisdiction in the federal courts to make the writ available to state prisoners, the century-old notion that the purpose of the writ was only to review the jurisdiction of the sentencing court still persisted and impeded the application of the writ.[57] The Supreme Court, however, began, in Professor Henry Hart's words, "a long process of expansion of the concept of a lack of 'jurisdiction.'"[58] First, in *Ex parte Lange*[59] the Court ordered the release of a federal prisoner who had twice been sentenced, in violation of his right to be free from double jeopardy.[60] Although the sentencing court had acted within its authority in convicting the petitioner of a federal crime, the Supreme Court classified the case as one including a defect in jurisdiction, reasoning that the sentencing court had possessed jurisdiction to impose only a single sentence.[61] Six years later, in 1879, the Court extended this theory in *Ex parte Siebold*,[62] holding that a trial court lacked jurisdiction when the defendant was charged under an unconstitutional statute. The Court explained, "An unconstitutional law is void, and is as no law."[63] In *Ex parte Wilson*[64] the Court again applied a liberal interpretation of jurisdiction in granting the writ to a prisoner who had been convicted without a grand jury indictment.

In these cases the Court had little difficulty viewing the habeas petitions as bringing questions of jurisdiction that would fall within the traditional scope of habeas corpus. But during this period the Court repeatedly reaffirmed its adherence to the traditional formulation of habeas jurisdiction by refusing to grant the writ in cases in which errors in the conviction or the indictment were alleged.[65] Nevertheless, "Once the concept of 'jurisdiction'

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56. Fay v. Noia, 372 U.S. 391, 416 (1963).

57. Hart, *The Supreme Court, 1958 Term, Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 103–04 (1959).

58. *Id.* at 104.

59. 85 U.S. (18 Wall.) 163 (1873).

60. The defendant had previously been ordered to pay a fine and serve a year in prison, but this original sentence had been vacated because it exceeded the maximum authorized punishment for the offense. *Id.* at 164.

61. *Id.* at 178.

62. 100 U.S. 371 (1879).

63. *Id.* at 376.

64. 114 U.S. 417 (1885).

65. *See In re* Belt, 159 U.S. 95 (1895); *Ex parte* Bigelow, 113 U.S. 328 (1885); *see also In re* Moran, 203 U.S. 96 (1906). Professor Bator explains that "[t]he strict jurisdictional test in fact continued to govern except in two categories of cases: where the allegation was that the conviction was had under an unconstitutional statute, and where the Court viewed the problem in terms of the illegality of the sentence rather than that of the judgment." Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 471 (1963).

is taken beyond the question of the court's competence to deal with the class of offenses charged and the person of the prisoner, it becomes a less than luminous beacon."[66]

IV. The Modern Era

A. *The Early Cases*

The commencement of the modern era of habeas corpus may be traced to the Court's historic decision in 1953 in the *Brown v. Allen* cases.[67] The stage had been set for *Brown v. Allen* earlier in the century in two important Supreme Court cases, *Frank v. Mangum*[68] and *Waley v. Johnston*.[69]

Unlike *Brown*, which had its genesis in racial prejudice, *Frank v. Mangum* arose from religious bias. Frank, a Jewish businessman in Atlanta, had been convicted and sentenced to death for the murder of a fourteen-year-old girl.[70] After the Supreme Court of Georgia affirmed the conviction,[71] Frank sought a writ of habeas corpus in federal court, alleging that the state court had denied him due process under the fourteenth amendment because it had allowed a mob to dominate his trial. Because of the prevailing concept that jurisdictional defects limited the issuance of the writ, Frank argued that mob conditions in and outside the courtroom had dominated the trial—even compelling his and his counsel's absence when the jury returned the verdict—to such an extent that the sentence and judgment were a nullity.[72] The district court dismissed the habeas petition.[73]

On appeal the Supreme Court held that if a mob had dominated the trial and intimidated the jury, then Frank's federal claim under the fourteenth amendment could be considered in determining the lawfulness of Frank's incarceration. But if the State had supplied corrective process, then the petitioner would not be entitled to habeas relief.[74] The Government contended that the defendant could not go outside the record to show loss of the trial court's jurisdiction. The Supreme Court rejected this argument, reasoning that since Congress could liberalize common-law procedure on habeas corpus, a federal court could inquire into the substance of a state prisoner's detention even if this required it to look beyond the record of his conviction to test jurisdiction of the state court.[75] The Court, however, denied relief on the ground that a competent state appellate court had accorded Frank "the fullest

66. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 470 (1963).

67. 344 U.S. 443 (1953). The Court considered three separate cases in those appeals: *Brown v. Allen*, *Speller v. Allen*, and *Daniels v. Allen*.

68. 237 U.S. 309 (1915).

69. 316 U.S. 101 (1942).

70. 237 U.S. 309, 311–12 (1915).

71. *Id.* at 312–14.

72. *See id.* at 312–16.

73. *Id.* at 311.

74. *See id.* at 335.

75. *Id.* at 331.

right and opportunity to be heard according to the established modes and procedures"[76] and had reviewed his federal claim fully and fairly. Although the *Frank* Court effectively expanded federal habeas corpus jurisdiction over state prisoners challenging their convictions on the basis of alleged federal constitutional violations, it limited habeas relief to those constitutional claims that had not been decided in the state courts. This rule prevailed for almost forty years, but the claimant still had to frame the habeas corpus petition in terms of constitutional errors that amounted to deprivation of jurisdiction.[77] Not until 1942, in *Waley v. Johnston*,[78] did the Court discard the notion that a jurisdictional defect was a necessary predicate for habeas relief.

Thus, by the time the Supreme Court heard *Brown v. Allen*, habeas corpus law had broken away from the rigid restraints imposed by jurisdictional review of constitutional errors. After *Waley* a habeas petitioner no longer needed to base his complaint on defects in jurisdiction. The habeas court was free to inquire into the circumstances of the state court proceedings to determine whether the state court had protected the petitioner's constitutional rights. It does not appear, however, that any of the pre-*Brown* cases ever suggested that the habeas court could reconsider constitutional contentions that had been fully litigated in state courts. *Brown v. Allen*, however, set the stage for the dramatic surge of habeas corpus cases in the sixties, for it permitted the challenge by federal habeas corpus of coerced confessions and racial discrimination in jury selection even though state courts had reviewed the merits of the constitutional claims.

B. *Civil Rights Activity at Mid-Century*

Cases like *Brown v. Allen* and its progeny, though representing major advances in habeas corpus law, were profoundly influenced by societal developments of the period. Congress had adopted the three post-Civil War constitutional amendments[79] and the Civil Rights Act of 1866[80] almost a century before, expressing a promise to blacks of equality and opportunity, both political and economic. In addition, the Civil Rights Act of 1875[81] gave blacks significant social rights to equal enjoyment of public accommodations, facilities, transportation, and places of amusement. Yet the rising hopes engendered by the constitutional amendments and legislation remained unfulfilled decade after decade as blacks met with bitter opposition from state and

76. *Id.* at 345. The majority's position in *Frank* was later substantially repudiated in Moore v. Dempsey, 261 U.S. 86 (1923), in an opinion by Justice Holmes, who had dissented in *Frank*. In *Moore*, a virtually identical case, the Court held that the state court's superficial disposition of the constitutional issues was not entitled to conclusive weight because the prisoners were not afforded sufficient corrective process. Under these circumstances the federal habeas court had a duty to inquire into the facts pertaining to the alleged due process violation. *Id.* at 91–92.

77. *E.g.*, Johnson v. Zerbst, 304 U.S. 458, 467–68 (1938).

78. 316 U.S. 101, 104–05 (1942).

79. U.S. CONST. amends. XIII, XIV, XV.

80. Act of Apr. 9, 1866, ch. 31, 14 Stat. 27.

81. Act of Mar. 1, 1875, ch. 114, 18 Stat. 335.

federal governments. Educational and employment opportunities remained meager. When Southern whites returned to power after the Reconstruction period, blacks were disenfranchised and once again relegated to a subordinate status in American life.[82]

The advent of the twentieth century worked little change in the rights or opportunities afforded blacks. Our gallant struggle in World War I to make the world safe for democracy provided few benefits for American blacks. By the time World War II was upon us, little had been done to enforce existing laws despite flagrant violations of blacks' civil rights.[83]

The post-World War II period, however, became a turning point in the realization of blacks' civil rights in this country. Our use of segregated military forces to fight racism in Europe demonstrated the hypocrisy of our treatment of blacks at home. Responding to widespread public sentiment, President Truman issued an executive order in 1948 that declared a presidential policy requiring equality of treatment and opportunity in the armed services for all persons, regardless of race, color, religion, or national origin.[84] The war also shifted public opinion toward more sympathetic consideration of blacks' rights. The experiences of American troops in the Orient, South Pacific, and Africa, the formation of the United Nations, and the attention drawn by emerging nonwhite nations may have influenced American racial attitudes to become more tolerant. "Against this background, the growing size of the Northern Negro vote made civil rights a major issue in national elections."[85]

In the meantime a national campaign waged by the NAACP against educational segregation in the public schools of the South reached a "triumphant climax"[86] in the 1954 Supreme Court decision, *Brown v. Board of Education*.[87] Ultimately, the campaign for civil rights led to the establishment in 1957 of the Federal Civil Rights Commission, which had the power to investigate discriminatory conditions and to recommend corrective measures.[88] During this period sixty civil rights bills were introduced in the House and referred to the Committee on the Judiciary. These bills touched on subjects ranging from antilynching, peonage, and crimes involving civil rights, to voting and fair employment practices.[89] In a message to Congress on June 19, 1963, President Kennedy reminded his listeners of recent street demonstrations by black citizens demanding equal access to public facilities and accommodations.[90]

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82. *See generally* NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 96–100 (1968) (hereinafter cited as NAT'L ADVISORY COMM. REP.).

83. *Id.* at 101.

84. Exec. Order No. 9,981, 3 C.F.R. 722 (1943–1948 Comp.).

85. NAT'L ADVISORY COMM. REP., *supra* note 82, at 105.

86. *Id.*

87. 347 U.S. 483 (1954).

88. NAT'L ADVISORY COMM. REP., *supra* note 82, at 105.

89. *See* H.R. REP. NO. 291, 85th Cong., 1st Sess. 1, *reprinted in* 1957 U.S. CODE CONG. & AD. NEWS 1966, 1966.

90. *See* S. REP. NO. 872, 88th Cong., 2d Sess. 8–9, *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 2355, 2363.

The civil rights movement led to the enactment of the Voting Rights Act of 1965.[91] The legislative history of the Act[92] recites the "upsurge of public indignation against the systematic exclusion of Negroes from the polls" that had marked the past decade in certain regions of the country.[93]

Around the same time, the attention of the Supreme Court was drawn to serious deficiencies in the selection of juries in state trials of black criminal defendants. Despite the well-established federal rule forbidding racial discrimination in jury selection, as late as the mid-fifties blacks were being systematically excluded from jury service. In 1948 the Supreme Court in *Brunson v. North Carolina*[94] reversed per curiam five state convictions because blacks had been intentionally excluded from juries on the basis of race. The Court similarly reversed a murder conviction in *Cassell v. Texas*[95] because of racial discrimination in the selection of grand jurors who had indicted a black petitioner. In this same period the Court reversed per curiam the convictions of four blacks sentenced to death for rape in the sensational case of *Shepherd v. Florida*[96] because the method of jury selection discriminated against blacks. In his concurrence Justice Jackson considered the jury selection issue only technical. He viewed the entire trial as a lamentable denial of due process and "one of the best examples of one of the worst menaces to American Justice."[97]

It was becoming increasingly evident that in a large section of the nation it was difficult, if not impossible, for a black person to obtain a fair trial that comported with federal constitutional standards. This pattern of constitutional violations undoubtedly impressed upon the Court the need for habeas corpus reform.[98] The Court took its first step to remedy this pattern of abuses in *Brown v. Allen*.[99]

C. *The Supreme Court Response*

In *Brown v. Allen* and its companion cases, *Daniels v. Allen* and *Speller v. Allen*, black state prisoners who had been sentenced to death sought a writ of habeas corpus, claiming racial discimination in jury selection and challenging the admissibility of alleged coerced confessions.[100] The federal district court reviewed the record of the state proceedings, but also heard evidence presented by the prosecution and defense. The court denied the writ, conclud-

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91. Act of Sept. 9, 1965, Pub. L. No. 89-110, 79 Stat. 437.

92. H.R. REP. NO. 439, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. CODE CONG. & AD. NEWS 2437.

93. *Id.* at 2440.

94. 333 U.S. 851 (1948).

95. 339 U.S. 282 (1950).

96. 341 U.S. 50 (1951).

97. *Id.* at 55 (Jackson, J., concurring).

98. *See generally* Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977).

99. 344 U.S. 443 (1953).

100. Daniels and Speller alleged discrimination in the selection of petit jurors while Brown alleged that of grand jurors.

ing that the state trial judge's findings were supported by the evidence, that the confessions were voluntary, and that the petitioners had not shown that blacks had been systematically excluded from jury service solely because of race.[101]

The state courts had fully considered the same federal constitutional issues raised in the habeas corpus proceedings. Nonetheless, on appeal the Supreme Court held that the petitioners were entitled to review of the constitutional issues on habeas corpus and that a federal court could consider those issues even if they had been fully reviewed on direct appeal.[102] The Court did not disapprove of the district court's taking of additional evidence. Rather, the Court believed this action was within the district court's discretion because it improved that court's ability to determine whether any fourteenth amendment violation had occurred.[103] The Court, however, observed that when the state record is adequate and the federal habeas court is satisfied that state courts have given fair consideration to federal constitutional rights, the federal court may, absent unusual circumstances, dispense with a hearing.[104]

Justice Frankfurter, in a separate majority opinion, stated that if it appears that the issue turns on basic facts which have been adjudicated against the habeas petitioners, the federal court may accept the state court's factual determination "[u]nless a vital flaw be found in the process of ascertaining such facts in the State court."[105] The primary majority opinion explains, "Although they have the power, it is not necessary for federal courts to hold hearings on the merits, facts or law a second time when satisfied that federal constitutional rights have been protected."[106]

Although opening habeas review to state prisoners desiring to relitigate constitutional claims, the Court did not jettison all restrictions on the availability of the writ. In *Daniels*, a companion case to *Brown*, the Court declined to permit a state prisoner to test a federal constitutional violation by using a habeas corpus petition in lieu of an appeal.[107] The Court refused habeas review because a state procedural rule had barred the petitioner's untimely appeal to the state courts.[108] Nonetheless, the decision in *Brown v. Allen* and the companion cases sharply expanded the scope of federal habeas corpus relief. Henceforth, even when a petitioner did not show that the state courts had failed to adequately consider his constitutional claims, the federal court could inquire into those claims on habeas review. Moreover, the *Brown*

101. 344 U.S. 443, 454 (1953).

102. *Id.* at 457–58. The Court indicated that a United States District Court should give the usual weight accorded under federal practice to the conclusions of state courts of last resort on federal constitutional issues, but added that these conclusions were "not *res judicata*." *Id.* at 458.

103. *Id.* at 478.

104. *Id.* at 463.

105. *Id.* at 506. (Frankfurter, J., separate majority opinion).

106. 344 U.S. 443, 464 (1953).

107. *Id.* at 485.

108. *Id.*

opinion established a broad power in federal district courts to conduct evidentiary hearings to redetermine the facts.[109] In essence, the focus of habeas corpus had now shifted away from "the adequacy of the state's corrective process or of the prisoner's personal opportunity to avail himself of this process."[110] Instead, the writ was transformed into a vehicle for testing the fundamental correctness of the state court's decision with a view toward "the avoidance in the end of any underlying constitutional error."[111] In Justice Frankfurter's words, state decisions "cannot, under the habeas corpus statute, be accepted as binding" on constitutional questions of law.[112] "The State court," he explained, "cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right."[113]

In 1963, when the Court addressed *Townsend v. Sain*, [114] it acknowledged the need to clarify the opinions in *Brown v. Allen*, because the lower federal courts were reaching "widely divergent" and "often irreconcilable results" in applying the principles of that case.[115] Because of its facts, *Townsend* offered a particularly suitable opportunity for the Court to announce guidelines for habeas corpus hearings in the federal courts and to expand the criteria for determining whether a de novo hearing should be conducted to ascertain the primary facts surrounding an alleged constitutional violation.

Townsend, convicted of murder and sentenced to death, exhausted his state remedies, including collateral review, and sought federal habeas corpus.[116] He claimed that he had been denied due process because of the admission of a confession obtained while he was under the influence of a truth serum drug administered by a police physician. The state court hearing did not disclose whether the drug injected into Townsend could have induced him to make statements that legally might be considered involuntary. This information, vital in determining whether the confession had been a product of his free will, had simply been omitted in the testimony of the medical expert, through no fault of Townsend.[117] Despite conflicting evidence, the state court had filed no opinion, conclusions of law, or findings of fact. Nevertheless, the federal district court denied Townsend an opportunity to present evidence

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109. Justice Jackson, in his concurrence, sharply denounced the Court's expansion of the scope of the writ. He believed it would adversely affect federal-state relations and foresaw the redundancy problem that would soon overtake the federal courts. He reminded the Court that the state chief justices had adopted a resolution in November 1952 condemning the practice of new, independent hearings in federal habeas proceedings, expressing the view that a final judgment of a state's highest court should be subject to review only by the Supreme Court of the United States. *See id.* at 534–48 (Jackson, J., concurring).

110. Hart, *The Supreme Court, 1958 Term, Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 106 (1959).

111. *Id.*

112. 344 U.S. 443, 506 (1953).

113. *Id.* at 508.

114. 372 U.S. 293 (1963).

115. *Id.* at 310.

116. *Id.* at 296.

117. *Id.* at 321.

and dismissed the petition on the basis of its examination of the state court record.[118]

The Supreme Court, turning to the Act of 1867 as well as the history of the writ and the Court's prior decisions, concluded that the power to relitigate facts on federal habeas corpus is "plenary":[119] if the petition alleges facts that, if proved, would entitle the petitioner to relief, the federal court has the power to receive evidence and try the facts de novo. According to the Court, the appropriate standard for the federal court to apply in cases in which the facts are in dispute is whether the state court afforded the applicant a full and fair evidentiary hearing, either at trial or on collateral review.[120] The Court held that the power to hold a new evidentiary hearing must be exercised if

> (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.[121]

But if the federal court concludes that the state court provided the petitioner a full and fair hearing and the findings are reliable, the district court may—and ordinarily should—accept the state-found facts. It need not do so, however; in its sound discretion and in any case, it may receive evidence bearing upon the constitutional claim.[122]

Although the Court believed that the *Brown* standard was too general to provide adequate guidance,[123] it reiterated a rule announced in *Brown*: when the federal habeas court accepts the state's factual findings, it must apply federal law to such findings independently and may not give binding weight on habeas to the state conclusions of law.[124] The Court had no difficulty in concluding that on the record in *Townsend* the district court must hold a hearing.[125]

Townsend's grant to federal district courts of broad authority to review constitutional issues arising in state criminal convictions had a substantial impact on traditional notions of federalism. *Townsend* dramatically extended the *Brown* decision: a federal court was now expected to review state court decisions on constitutional issues and to relitigate questions of fact whenever "there is some indication that the state process has not dealt fairly or completely with the issues."[126] Indeed, within a short time relitigation became the

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118. *Id.* at 297.
119. *Id.* at 312.
120. *Id.*
121. *Id.* at 313.
122. *Id.* at 318.
123. *Id.* at 310.
124. *Id.* at 318.
125. *Id.* at 321.
126. *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1122 (1970).

order of the day in habeas cases. *Townsend* radically changed the character of the habeas review function from a mere review of the state record to a mandatory duty in many situations to develop an independent record and redetermine the primary facts. State criminal convictions were now subject to collateral attack in the federal court on numerous constitutional issues.[127]

On the day the Court announced *Townsend*, it also decided *Fay v. Noia*,[128] which dealt with a petitioner's procedural default in the state courts. The default issue was not especially important under *Brown* because *Brown* had contemplated that, in the ordinary case, federal habeas corpus review would be limited to the state record in the absence of a "vital flaw" in the state fact-finding process.[129] Under *Townsend*, however, redetermination of the facts relating to the constitutional issues that were decided in the state court became the norm. But some prisoners, because of a state procedural default, could not have their federal constitutional issues adjudicated in the state court and, therefore, were barred from having the constitutional claims heard by federal habeas courts by the rule of *Brown*'s companion case, *Daniels v. Allen*.[130] *Fay v. Noia* represented the Court's first effort to deal with this problem since its landmark decision seventy-seven years earlier in *Ex parte Royall*,[131] which held that habeas petitioners challenging the constitutionality of a state statute in the federal courts must first exhaust their state court remedies.

In *Fay v. Noia* the state court had convicted the petitioner, Noia, of murder solely on the basis of what he claimed was an involuntary confession.[132] After deliberately allowing the time for direct appeal to lapse,[133] Noia sought a writ of habeas corpus in federal district court.[134] On review the narrow question presented to the Supreme Court was whether the State's admitted use of an involuntary confession entitled Noia to postconviction collateral relief despite his failure to seek review in the state courts.[135]

Painting broadly, as it had in *Townsend*, the Court held that (1) the statute gives federal courts the power to grant relief, despite the petitioner's failure to pursue a state remedy no longer available at the time he applied for habeas; the doctrine that a state procedural default constitutes an adequate and inde-

127. Several years after *Townsend* the Court held in Kaufman v. United States, 394 U.S. 217 (1969), that primary factual determinations pertaining to alleged constitutional violations against federal prisoners could also be collaterally attacked in federal courts under 28 U.S.C. § 2255 to the same extent that they were subject to attack under § 2254 for state prisoners. *Id.* at 221–31.

128. 372 U.S. 391 (1963).

129. 344 U.S. 443, 506 (1953) (Frankfurter, J., separate majority opinion).

130. 344 U.S. 443, 486–87 (1953).

131. 117 U.S. 241 (1886).

132. 372 U.S. 391, 394–96 (1963).

133. The prisoner intentionally did not appeal because of fear that a second trial might result in a death sentence. *Id.* at 439–40. Noia's two codefendants had unsuccessfully appealed in the state court, but later obtained their release under a federal writ of habeas corpus on the ground that the confessions had been involuntary. *Id.* at 395.

134. *Id.* at 395–96.

135. *Id.* at 394.

pendent state ground barring direct Supreme Court review is not to be extended to preclude federal habeas relief; (2) Noia's failure to appeal is not to be deemed a failure to exhaust "'the remedies available in the courts of the State' [under] § 2254"[136] because the possibility of appeal was no longer open to him when he filed his habeas petition; and (3) under these circumstances Noia's failure to appeal cannot be deemed an intelligent and understanding waiver of his right to appeal sufficient to foreclose federal habeas relief.[137]

The Court thus effectively overruled *Daniels v. Allen*, decided ten years earlier, and concluded that Noia's deliberate decision not to bring a direct appeal, though precluding further relief in the state courts, did not bar federal habeas relief.[138] Finally, the Court articulated a "deliberate bypass" rule in an attempt to shade the bright line it had painted. Under this rule a federal judge "may in his discretion deny relief to an applicant who has deliberately bypassed the orderly procedure of the state courts."[139] The waiver must, however, meet the standard of "an intentional relinquishment or abandonment of a known right or privilege" enunciated in *Johnson v. Zerbst*.[140]

As a result of *Townsend* and *Noia*, federal habeas corpus had, indeed, acquired enormous flexibility and power. The habeas process now not only provided collateral review of constitutional claims arising out of criminal convictions in both the state and federal courts, but also transcended the process available on direct review. Under *Townsend* a federal habeas court could relitigate de novo primary factual questions if it was dissatisfied with state court fact finding. Moreover, under *Noia* it had the extraordinary authority to litigate issues that the petitioner had neglected under state law through procedural error or by default, except when the applicant's conduct amounted to a deliberate bypass under the *Johnson v. Zerbst* standard.

Beginning as a rivulet during the early Colonial days, the Great Writ had now become a mighty river that served as a powerful force in the preservation of personal liberties. It had originated as a means of collateral attack on the jurisdiction of the sentencing court in circumstances in which the appeal process was inadequate to protect the defendant's constitutional rights. As the Court expanded its interpretation of due process rights under the fourteenth amendment,[141] the writ's power and importance increased. The habeas court now had the power to inquire into innumerable constitutional issues, and it had also acquired an impressive review function and the power to redetermine the primary facts.[142]

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136. *Id.* at 399.
137. *Id.* at 398–99.
138. *Id.*
139. *Id.* at 438.
140. 304 U.S. 458, 464 (1938).
141. *See, e.g.*, Escobedo v. Illinois, 378 U.S. 478 (1964); Mapp v. Ohio, 367 U.S. 643 (1961).
142. Habeas corpus in the federal courts had thus come full circle. It originated as a means of collateral attack in those circumstances in which the appeal process was not adequate to ensure the protection of the constitutional rights involved. It then absorbed the review process in addition to its traditional role of collateral attack. Finally, it was returned to the status of providing a vehicle for collateral attack,

As Justice Tom Clark predicted in his dissent in *Fay v. Noia*,[143] the federal courts quickly felt the effect of both *Townsend* and *Noia*: a rash of habeas corpus petitions soon inundated the federal judiciary.[144] Reaction to the broad scope of the rules laid down in those cases set in after several years. The relitigation generated after *Townsend* affronted the dignity of state judges, who resented the idea of a single federal judge reversing not only a state trial judge but also the state appellate court. Relitigation also challenged the integrity of the state fact-finding process. *Fay v. Noia* may have disturbed state judges even more than *Townsend* because of its deliberate bypass rule and its rejection of the well-established doctrine that a state procedural default which constitutes an adequate and independent state ground to bar direct review also bars federal courts from granting habeas relief.

Congress responded to these problems in 1966 by limiting habeas review of state factual determinations. It amended section 2254(d) of the 1948 habeas statute[145] by providing that state court factual findings shall be presumed correct unless one of eight specified conditions is met.[146]

Townsend and *Fay* represent the watershed in federal habeas corpus jurisprudence. They established important principles that, although severely criticized, remained in effect for the next decade.

D. *The Explosion in Crime and Lawlessness*

In the mid-1960s the growth of violent crime became a matter of serious national concern.[147] A 1968 Gallup poll revealed that for the first time since

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even on those issues where traditionally the appeal process had been sufficient to protect the constitutional rights in question.

Michael, *The "New" Federalism and the Burger Court's Deference to the States in Federal Habeas Proceedings*, 64 IOWA L. REV. 233, 246 (1979).

143. 372 U.S. 391, 445–46 (1963) (Clark, J., dissenting).

144. In 1941, prior to *Brown v. Allen*, only 127 petitions were filed in federal court. *Id.* at 446 n.2. In 1962, the year prior to *Noia*, 1408 petitions were filed. In 1970 the number had grown to 9063. *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL CONFERENCE OF THE UNITED STATES REPORT—ANNUAL REPORT OF THE DIRECTOR 1971, at 135 (1971).

145. Act of Nov. 2, 1966, Pub. L. No. 89–711, 80 Stat. 1105 (codified as amended at 28 U.S.C. § 2254(d) (1976)).

146. The state court's factual findings are presumed correct unless it appears:

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the appellant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding;

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.

28 U.S.C. § 2254(d) (1976).

147. *See generally* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CRIME AND ITS IMPACT—AN ASSESSMENT 35–41 (1967).

scientific polling began in the mid-1930s Americans viewed "crime and lawlessness" as the country's most pressing domestic problem.[148] The President's Commission on Law Enforcement and Administration of Justice—which included Lewis F. Powell, soon to be appointed to the Supreme Court of the United States—reported in 1967 that news concerning the growth of crime across the nation had created "a sense of crisis in regard to the safety of both person and property."[149]

In response, Congress in 1968 enacted the Omnibus Crime Control and Safe Streets Act, which substantially revised and strengthened the United States Criminal Code.[150] In the same year presidential candidate Richard M. Nixon, taking note of the mood of the electorate, successfully campaigned on a platform that primarily advocated law and order.[151]

E. *The Ebb Tide*

Within a short time after President Nixon assumed office, new faces appeared on the Supreme Court. They joined others on the Court who had lamented the sweeping expansion of federal habeas relief, had objected to relitigation of state criminal trials, and had felt the need for finality of judgment. Commencing in 1976 and continuing to the present, the Court has announced a series of decisions limiting the availability of federal habeas relief. Probably the most significant was the Court's decision in *Stone v. Powell*[152] in 1976. But the result in that case had been foreshadowed several years earlier by the concurrence of Justice Powell in *Schneckloth v. Bustamonte*.[153]

Schneckloth concerned a consent search of a car stopped by officers for traffic violations on a California highway. The State subsequently offered evidence discovered in the car, which resulted in Bustamonte's conviction for unlawful possession of a check with intent to defraud.[154] The United States Supreme Court refused Bustamonte's request for relief.[155] In his concurrence Justice Powell laid the groundwork for his historic opinion in *Stone v. Powell*. He described the current state of the law permitting a federal or state prisoner an opportunity to seek collateral review of search and seizure claims in precisely the same manner as on direct appeal.[156] He saw nothing in the history and purpose of habeas corpus, "the desired prophylactic utility of the exclusionary rule as applied to Fourth Amendment claims";[157] nor did he see any other sound reason to justify the application of federal habeas power to

148. A. ROGOW, THE DYING OF THE LIGHT 184 (1975).
149. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CRIME AND ITS IMPACT—AN ASSESSMENT 85 (1967).
150. Pub. L. No. 90-351, 82 Stat. 197 (1968).
151. *See, e.g.*, N.Y. Times, Aug. 9, 1968, at 1, col. 3.
152. 428 U.S. 465 (1976).
153. 412 U.S. 218 (1973).
154. *Id.* at 220.
155. *Id.* at 249.
156. *Id.* at 251 (Powell, J., concurring).
157. *Id.*

such claims. Justice Powell found some defense for the use of the writ only when a prisoner raises a constitutional claim bearing on his innocence.[158]

The Court imposed significant strictures on the writ in 1976 in *Francis v. Henderson*[159] and *Stone v. Powell*.[160] Although factually similar to the grand jury issue in *Brown v. Allen*, *Henderson* actually raised the deliberate bypass issue of *Fay v. Noia*. The petitioner challenged his 1965 Louisiana state court conviction for murder on the ground that blacks had been unconstitutionally excluded from the grand jury that indicted him.[161] Under state law such challenges to the composition of a grand jury were deemed waived if not made prior to trial, and the prisoner had failed to timely object and to appeal in the state courts.[162] He unsuccessfully sought state collateral relief. The federal district court granted a habeas writ for review of his federal constitutional claim, but the United States Court of Appeals for the Fifth Circuit reversed,[163] relying on *Davis v. United States*,[164] a case concerning a federal prisoner.

The Supreme Court affirmed, holding that the Court of Appeals had correctly applied the *Davis* rule to state prisoners seeking federal habeas relief.[165] *Davis* had relied on Federal Rule of Criminal Procedure 12, which requires that challenges to jury selection be made prior to trial and dictates that failure to do so shall be deemed a waiver in absence of cause for granting relief.[166] In *Davis* the Court had interposed an additional requirement for relief, one that would receive prominent attention in future cases—a requirement of prejudice resulting from the constitutional deprivation.[167]

In *Henderson* the Court endorsed the *Davis* standards, resting its holding on "considerations of comity and concerns for the orderly administration of criminal justice."[168] Although *Fay v. Noia* permitted state prisoners who had failed to take advantage of state appellate review to obtain relief in federal court unless they had deliberately bypassed state remedies, *Francis v. Henderson* now required these petitioners to jump the hurdle of showing cause and prejudice.[169] Thus, the Court in *Henderson* applied its first stricture to the waiver rule of *Fay v. Noia*. Not only did the decision severely restrict *Noia*, but as Justice Brennan charged in his dissent, the Court may have undermined *Noia* sub silentio without actually reversing it.[170] Consequently, in *Francis v. Henderson* the *Davis* cause and prejudice standard became a substantive part of the current law governing access to federal habeas corpus

158. *Id.* at 256–58.
159. 425 U.S. 536 (1976).
160. 428 U.S. 465 (1976).
161. 425 U.S. 536, 538 (1976).
162. *Id.* at 537–38.
163. *Id.* at 538.
164. 411 U.S. 233 (1973).
165. 425 U.S. 536, 542 (1976).
166. *Id.* at 539.
167. *Id.* at 542 n.6 (citing Davis v. United States, 411 U.S. 233, 244–45 (1973)). *But see* 425 U.S. 536, 551–52 n.3 (1976) (Brennan, J., dissenting).
168. 425 U.S. 536, 538–39 (1976).
169. *Id.* at 542.
170. *Id.* at 545–46 (Brennan, J., dissenting).

review. The Court, however, offered no guidelines suggesting when comity and federalism would require a federal court to defer to a state procedural default rule that barred consideration of constitutional issues.

In *Stone v. Powell*,[171] decided shortly afterward, the seeds that had initially been planted by Justice Black in *Kaufman v. United States*[172] grew to fruition. The Court in *Stone* held that it would not grant habeas corpus relief based on the controversial exclusionary rule it had originally adopted in 1914.[173] The question raised in *Stone* was whether a federal habeas court should consider a state prisoner's petition claiming that the state trial court had erroneously admitted evidence obtained by an illegal search and seizure, even though the state court had previously afforded him an opportunity for full litigation of his constitutional claim.[174]

In an opinion written by Justice Powell, the Court noted that "the exclusionary rule has long been the subject of sharp debate"[175] and that the evidence obtained from empirical research concerning its utility was still inconclusive.[176] The Court weighed the utility of the exclusionary rule against the societal costs of extending it to collateral review of fourth amendment claims.[177] The Court concluded that the exclusionary rule would apply at trial and on direct appeal of state court convictions, but that it would not enforce the rule in collateral proceedings because in that context its value was "outweighed by the acknowledged costs to other values vital to a rational system of criminal justice."[178] The Court emphasized that fourth amendment claims did not go to the merits—that is, to the defendant's guilt or innocence. Thus, the Court held that when a state has provided an opportunity for full and fair litigation of a fourth amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence introduced at trial was obtained by an illegal search and seizure.[179]

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171. 428 U.S. 465 (1976).

172. 394 U.S. 217, 231–42 (1969) (Black, J., dissenting). Justice Black, in dissent, forcefully expressed the view that a claim under the fourth amendment for illegal search and seizure differed crucially from many other constitutional rights. He saw the exclusionary rule as a procedural tool having no bearing on guilt and, therefore, felt that it should be unavailable in habeas proceedings. *Id.* at 237–38.

173. 428 U.S. 465, 494–95 (1976). The exclusionary rule was originally adopted in Weeks v. United States, 232 U.S. 383 (1914).

174. 428 U.S. 465, 469 (1976). The petitioner had been arrested by police for violation of a vagrancy statute. In a search incident to the arrest, an officer had uncovered a gun. In his subsequent murder trial in state court, the petitioner had unsuccessfully moved for suppression of the gun as evidence on the ground that the vagrancy statute under which he had been arrested was unconstitutionally vauge. *Id.* at 469–70. If the statute were unconstitutional, the arrest would be invalid, and any evidence obtained incident to that arrest would be inadmissible under the exclusionary rule of Mapp v. Ohio, 367 U.S. 643 (1961). The state appellate court affirmed, and the federal district court denied the request for habeas relief. 428 U.S. 465, 470 (1976).

175. 428 U.S. 465, 492 n.32 (1976).

176. *Id.* at 492.

177. *Id.* at 489–94.

178. *Id.* at 494.

179. *Id.* Concurring, Chief Justice Burger felt that the exclusionary rule had been in force long enough to demonstrate flaws and that it had produced bizarre miscarriages of justice. *Id.* at 496. Justice Brennan, dissenting for himself and Justice Marshall, expressed apprehension

> that the groundwork is being laid today for a drastic withdrawal of federal habeas jurisdiction, if not for all grounds of alleged unconstitutional detention, then at least for claims—for example, of double

After *Stone v. Powell* search and seizure questions could be reviewed on habeas only when the petitioner had been denied an opportunity for a full and fair hearing in the state court. *Stone* represented a dramatic turnabout from the days of *Fay v. Noia*: the Court was now severely contracting the federal courts' power to hear federal habeas corpus claims arising out of a state's failure to apply the exclusionary rule.

Whatever vitality remained in *Fay v. Noia* after *Stone v. Powell* was drained away the following year in *Wainwright v. Sykes*.[180] In *Sykes* a state prisoner convicted of murder brought a federal habeas petition challenging his detention on the basis of *Miranda v. Arizona*.[181] Although the state trial court had admitted into evidence inculpatory statements that he had previously made to police officers, the petitioner had not objected that he had not understood the *Miranda* warnings read to him. The trial judge had neither held a fact-finding hearing nor questioned sua sponte the admissibility of the statements. On appeal the prisoner did not challenge the inculpatory statements. After unsuccessfully seeking relief in state collateral proceedings, he sought a federal writ of habeas corpus.[182]

Both the federal district court and the court of appeals held that *Jackson v. Denno*[183] required a state court hearing on the voluntariness of the statements.[184] The court of appeals also ruled that the petitioner's failure to comply with Florida's procedural contemporaneous objection rule did not bar review of the suppression claim in the habeas proceeding because the right to object had not been deliberately bypassed.[185]

Taking this opportunity to flesh out its decision in *Francis v. Henderson* and thereby further limit the effect of *Fay v. Noia*, the Court addressed the issue whether a default under a state's procedural rule barring state court review of a claimed error under *Miranda* in admitting the prisoner's confession would also bar federal habeas review. The Court held that the *Francis v. Henderson* rule, which bars federal habeas review of an alleged defect in the selection of a grand jury absent a showing of cause and prejudice resulting from a state procedural waiver, also applies to a waived objection to the admission of a confession at trial.[186] The Court left open for future decisions the precise definition of the cause and prejudice standard, but noted that it is

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jeopardy, entrapment, self-incrimination, *Miranda* violations, and use of invalid identification procedures—that this Court later decides are not "guilt related."

Id. at 517–18 (Brennan, J., dissenting) (footnote omitted).

180. 433 U.S. 72 (1977).

181. *Id.* at 74–75. In *Miranda*, 384 U.S. 436 (1966), the Court held that statements made during a custodial interrogation of an accused are inadmissible at trial unless the police first advise the suspect that he has the right to remain silent, that anything he says will be used against him in court, that he has the right to consult with a lawyer and to have the lawyer with him during interrogation, and that, if he is indigent, a lawyer will be appointed to represent him. *Id.* at 467–73.

182. 433 U.S. 72, 74–75 (1977).

183. 378 U.S. 368 (1964).

184. 433 U.S. 72, 75–76 (1977).

185. *Id.* at 76–77.

186. *Id.* at 87.

narrower than the deliberate bypass standard set forth in *Fay v. Noia*.[187] The Court also stated in unmistakable terms that it was rejecting the sweeping language of *Fay v. Noia* and explained at length its reasons for doing so.[188] Thus, the Court once again narrowed the scope of federal habeas relief by expanding the independent, adequate state ground rule to bar habeas relief.

In 1982 the Supreme Court demonstrated in a trilogy of habeas corpus cases its intention to further curb the availability of habeas relief in the federal courts. The first of these, *Rose v. Lundy*,[189] extended the old and well-established exhaustion rule of *Ex parte Royall*.[190] In *Lundy* a state prisoner sought federal habeas relief from his conviction for rape and other sexual offenses. His federal petition included both claims that had been exhausted and claims that had not been exhausted in the state courts.[191] Justice O'Connor,[192] writing for the Court, noted that the current habeas statute,[193] adopted in 1948, does not address the problem of petitions containing both exhausted and unexhausted claims[194] and that the courts of appeals were divided on the issue whether total exhaustion was required before federal review was possible.[195] For reasons of federal-state comity and judicial efficiency, the Court adopted a rule requiring total exhaustion in the state courts of all claims set forth in the petition before a federal district court may consider any of the habeas claims—even those that had been exhausted.[196] Accordingly, upon filing a petition containing both exhausted and unexhausted claims, the petitioner must amend to delete the unexhausted claims or suffer dismissal of the petition. The majority of the Court could not agree whether claims deleted by amendment of the petition were thereafter forever barred from federal habeas review.[197]

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187. *Id.*

188. *Id.* at 87–90.

189. 455 U.S. 509 (1982).

190. 117 U.S. 241 (1886). In *Royall* the Supreme Court affirmed the lower court's dismissal of habeas corpus petition because the petitioner had not presented his constitutional claims to the state courts. *See supra* text accompanying note 131.

191. 455 U.S. 509, 510 (1982).

192. Justice O'Connor had recently expressed her views on federal collateral review of state court convictions in a law review article written while she was still a state court of appeals judge. O'Connor, *Trends in the Relationship Between the Federal and State Courts From the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801 (1981).

193. 28 U.S.C. § 2254 (1976) provides in part:

> (b) An application for writ of habeas corpus in behalf of [a state prisoner] shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

194. 455 U.S. 509, 516–17 (1982).

195. *Id.* at 513 n.5.

196. *Id.* at 518–22. For a case illustrating some ramifications of this total exhaustion rule, see Williams v. Holbrook, 691 F.2d 3 (1st Cir. 1982).

197. 455 U.S. 509, 520–21 (1982).

Justice Blackmun, concurring narrowly on a need to remand, disagreed with the majority's new "Draconian" and "misguided" exhaustion rule.[198] He saw inconsistencies with previous holdings of the Court, such as *Brown v. Allen*,[199] and aptly pointed to features of the rule that appeared to be destructive rather than supportive of federal-state comity. He saw nothing useful in remitting a petitioner to a state court to exhaust a patently frivolous claim—which the federal court was certain to reject—before the federal court could consider a meritorious, exhausted ground for relief.[200] He concluded that the rule would be a trap for the unwary, would raise definitional problems pertaining to total exhaustion, would delay the resolution of serious claims, and would tend to increase rather than decrease the burden on both the state and federal courts.[201] Justice Stevens, in his dissent, also advanced cogent objections to the adoption of the total exhaustion rule.[202]

As the concurrence and the dissent point out, *Lundy*'s total exhaustion rule may not, in the final analysis, promote judicial efficiency or federal-state comity. The rule may serve only to increase the workload for both state and federal courts, create more paperwork and expense, and delay the final disposition of the proceedings. *Lundy* does, however, provide further notice of the Supreme Court's hostility to state prisoner habeas petitions that do not raise questions of fundamental fairness.

The second case of the 1982 trilogy was *Engle v. Isaac*.[203] The State of Ohio had indicted Isaac for murder, and Isaac had pleaded self-defense. The trial judge instructed the jury that the defendant bore the burden of proving self-defense. The defendant did not object to the charge, and the jury found him guilty.[204] While his appeal was pending, the Ohio Supreme Court, in *State v. Robinson*,[205] construing a 1974 revision to the Ohio criminal code, held that a criminal defendant could not be required to bear the burden of proving self-defense.[206] Nevertheless, the state appellate court denied relief to Isaac because of his failure to preserve the error by objection, which the Ohio Rules of Criminal Procedure require.[207] The Supreme Court of Ohio dismissed Isaac's appeal for want of substantial constitutional question.[208]

A United States district court subsequently denied Isaac habeas relief

198. *Id.* at 526–29 (Blackmun, J., concurring).

199. 344 U.S. 443, 447 (1953).

200. 455 U.S. 509, 525 (1982) (Blackmun, J., concurring).

201. *Id.* at 522, 530.

202. *Id.* at 538–50 (Stevens, J., dissenting).

203. 456 U.S. 107 (1982). The opinion also disposes of two other cases, Perini v. Bell, 635 F.2d 575 (6th Cir. 1980), and Engle v. Hughes, 642 F.2d 451 (6th Cir. 1980). The factual distinctions in the three cases are not relevant to this discussion and reference is made only to the facts in *Isaac*. The legal issue is the same in all three cases.

204. 456 U.S. 107, 113–14 (1982).

205. 47 Ohio St. 2d 103, 351 N.E.2d 88 (1976).

206. The petitioner in *Isaac* had been tried and convicted after the effective date of the new criminal code but before the decision in *Robinson*.

207. 456 U.S. 107, 115 (1982). *See* OHIO R. CRIM. P. 30.

208. *Id.* at 116.

because his failure to object at trial constituted a waiver of his constitutional claim and because he had not demonstrated cause or prejudice, which *Sykes* requires.[209] The United States Court of Appeals for the Sixth Circuit reversed, reasoning that cause existed because Ohio's established practice would have made any objection to the instruction futile, and that prejudice was clear because the burden of proof was a critical element in the fact finding.[210]

The United States Supreme Court reversed. It first rejected the prisoner's argument that the cause and prejudice standard of *Wainwright v. Sykes* should be limited to constitutional error not affecting the truth-finding function of the trial. Thus, even if the truth-finding process is challenged, under *Isaac* "any prisoner bringing a constitutional claim to the federal courthouse after a state procedural default must demonstrate cause and prejudice before obtaining relief."[211] The Supreme Court rejected the idea that the futility of presenting an objection in the state court was a sufficient reason for failing to object and, thus, could not accept the Court of Appeals' finding of adequate cause. A defendant who perceives or has reason to know of a constitutional claim must object properly and may not bypass the state court merely because it may be unsympathetic.[212] The Court explained that the cause and prejudice standard "is more demanding than *Fay*'s deliberate bypass requirement" and that "perceived futility alone cannot constitute cause."[213] Since it found no cause, the Court did not consider the prejudice prong of the standard.[214]

On the same day that the Court decided *Engle v. Isaac,* it also announced its decision in *United States v. Frady*,[215] the third case of the trilogy. Frady, who had been convicted of first degree murder in 1963 by the United States District Court for the District of Columbia, sought to have his sentence vacated by a motion for federal collateral relief under 28 U.S.C. § 2255. He claimed that the trial court had erroneously instructed the jury on the meaning of malice and that the instruction had eliminated the possibility of a manslaughter verdict.[216] The court denied the motion because Frady had failed to challenge the instructions on direct appeal or, as required by Federal Rule of Criminal Procedure 30, in prior motions.[217] The court of appeals applied the

209. *Id.* For a discussion of the *Sykes* decision, see *supra* text accompanying notes 180–88.

210. 456 U.S. 107, 118 (1982).

211. *Id.* at 129.

212. *Id.* at 130.

213. *Id.* at 130 n.36.

214. *See id.* at 135. The Court was equally unsympathetic in rejecting the contention that at the time of trial the defendants could not have known that Ohio's self-defense instructions raised constitutional questions. The Court felt that the claims were "far from unknown" at the time of trial because *In re* Winship, 397 U.S. 358 (1970), decided more than four years earlier, had laid the basis for their constitutional claim. 456 U.S. 107, 131 (1982). Thus, the Court appeared to apply the cause and prejudice standard regardless of the nature of the constitutional claims and suggested that "victims of a fundamental miscarriage of justice" should have no difficulty meeting that standard. *Id.* at 135.

215. 456 U.S. 107, 152 (1982).

216. *Id.* at 157–58.

217. *Id.* at 158. FED. R. CRIM. P. 30 provides in pertinent part that "[n]o party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

plain error standard of Federal Rule of Criminal Procedure 52(b), which governs relief on direct appeal for errors not objected to at trial, rather than the cause and prejudice standard of *Sykes*, and reversed.[218]

Formulating the issue to be whether the same standard of review applies both to collateral challenge and to challenge on direct review to a criminal conviction by a federal prisoner under section 2255, the Court concluded that federal prisoners, like state prisoners, should surmount "significantly higher hurdle[s]" to obtain relief in a collateral proceeding.[219] The Court therefore applied the cause and prejudice standard. It found unnecessary any inquiry whether cause existed, because it was confident that Frady had not suffered "actual prejudice of a degree sufficient to justify collateral relief nineteen years after his crime."[220]

Thus, with the 1982 trilogy of cases the Supreme Court significantly contracted the availability of federal habeas corpus relief. The collateral relief principles it had formulated in the previous decade would be applied to both federal and state prisoners. Persons seeking relief on habeas corpus would be subject to a significantly higher standard of review than would those bringing a direct appeal. Procedural defaults at the trial level could be overcome on collateral attack only after the habeas petitioner had met the cause and prejudice standard of *Sykes*. The progressive expression of antipathy to collateral relief by the Court in these opinions is evident.[221] It is most evident in *Engle v. Isaac*, in which Justice O'Connor observed that "[l]iberal allowance of the writ, moreover, degrades the prominence of the trial itself."[222] The Constitution and laws, she noted, afford the accused a multitude of protections at trial.[223]

It appears that the polestar of habeas corpus relief for the present Court is whether an application is based on a fundamental miscarriage of justice. It remains to be seen whether the Court has in the past decade erected hurdles of such dimension that they substantially impede all serious efforts to establish a miscarriage of justice. In his dissent in *Rose v. Lundy*, Justice Stevens pointed to specific examples of fundamental trial errors that would justify collateral relief regardless of the passage of time and of the failure to properly preserve objections to error in the original trial.[224] He likewise observed in his concurring and dissenting opinion in *Engle v. Isaac* that the Court's preoccupation with procedural default hurdles, regardless of the type of claim, is more likely to complicate than to simplify the habeas process for federal judges.[225]

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218. 456 U.S. 152, 158–59 (1982).
219. *Id.* at 166.
220. *Id.* at 168.
221. In his dissent in *Engle v. Isaac*, Justice Brennan described the antipathy as "unvarnished hostility." 456 U.S. 107, 148 (1982).
222. 456 U.S. 107, 127 (1982).
223. *Id.*
224. 455 U.S. 509, 543–44 (1982) (Stevens, J., dissenting).
225. 456 U.S. 107, 136 (1982) (Stevens, J., concurring in part and dissenting in part).

Justice Brennan also expressed his disapproval in *Engle v. Isaac* of habeas procedure so restrictive that it denies relief for constitutional errors that affect the truth-finding function of the trial. He saw no virtue in sparing the accused the ordeal of a retrial that the accused himself had requested, or in ensuring the finality of a conviction arguably tainted by constitutional errors that affected the truth-finding process at trial.[226] He believed the faulty allocation of the burden of proof on the accused constituted "a denial of due process of intolerable proportions."[227] He also rejected the Court's analysis in *Frady*. Instead of giving federal prisoners a nonpreferred status, Justice Brennan protested, rejection of the plain error rule on collateral review left federal prisoners bound "more tightly than their state counterparts" to the Court's procedural barriers because state courts may still be able to grant state prisoners the benefit of the plain error rule in state collateral review.[228]

V. CONCLUSION

On September 2, 1942, the United States Court of Appeals for the District of Columbia decided *Ex parte Rosier*,[229] a habeas case undistinguished in legal history. The case dealt with an indigent and friendless prisoner committed to St. Elizabeth's Hospital in Washington, D.C. who had unsuccessfully sought leave to file his own holographic habeas petition in forma pauperis in federal district court. The district court also denied his right to appeal in forma pauperis, but the court of appeals, upon application by the prisoner, directed the clerk of the district court to file the appeal *nunc pro tunc* and appointed counsel to protect the prisoner's rights on appeal.[230] Upon hearing the appeal the court of appeals reversed and remanded, concluding that the prisoner had alleged facts entitling him to a hearing on the petition and the appointment of counsel in the district court.[231]

The appellate court's careful review of this poor, helpless petitioner's case and its sensitive protection of his rights, including a direction to file his petition and appeal without prepayment of costs, attracted the attention of A. H. Colcord. Editorializing on the case in *Current History*, he observed:

> [The] desire for freedom and for security from oppression seems instinctive in man. It cannot be permanently frozen into an unalterable body of law or static code for, as social or economic conditions create new and inescapable pressures, old barriers must be widened and new bulwarks erected. That these rights are in harmony with what may be called "natural justice" and spring from it, gives them their great and irresistible power.[232]

The passage of forty years since this article was published in 1943 has not

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226. *Id.* at 146–47 (Brennan, J., dissenting).
227. *Id.* at 150.
228. 456 U.S. 152, 183 (Brennan, J., dissenting).
229. 133 F.2d 316 (D.C. Cir. 1942).
230. *Id.* at 316.
231. *Id.* at 332–33.
232. Colcord, *Civil Rights and Freedom*, 4 CURRENT HIST. 32, 34 (1943).

eroded but reinforced the substance of Colcord's thoughtful message. The history of the Great Writ, especially during the flood tide in the years following *Ex parte Rosier*, demonstrates that federal habeas corpus law, concerned as it is with deprivation of fundamental liberties, has not been "permanently frozen into an unalterable body of law or static code."[233]

The long and generally progressive course of the federal writ, the enlargement of its remedies, and, in the past decade, the constriction of these remedies, may not be attributed solely to the judicial application of legal principles to important constitutional issues. The forward motion of habeas corpus law, and its fluctuations, reflect the inescapable societal pressures that have broken down rigid traditional jurisdictional barriers and given the writ dynamic qualities.

Despite considerable public misconception to the contrary, congressional legislation—not judicial activism—first energized and broadened the writ, thus enabling the federal courts to meet the problems of a complex, growing, and pluralistic society that included substantial racial minorities. Reacting to the needs of a post-Civil War society, the Congress in 1867 made federal habeas corpus applicable to state prisoners and relaxed procedural restraints. In *Brown v. Allen* the Supreme Court took a giant step toward making the aspirations of the Congress of 1867 a reality.

Looking back after almost two decades, the rules announced in *Townsend v. Sain* and *Fay v. Noia* broadening the scope of the writ may now seem extreme to some, but they may, nonetheless, have served a useful and important purpose when they were announced. The new rules helped implement a widely heralded civil rights movement that had begun in the early 1950s to arouse once more the conscience of America. The frustrations engendered by widespread disregard of civil rights almost a century after the Emancipation and the inability of black defendants to obtain a fair trial in many parts of the country focused the attention of a sensitive Supreme Court on a definite need for legal reform and for a more expansive rule for collateral review of state criminal convictions. *Townsend v. Sain* and *Fay v. Noia* appear to have been a response to perceived social and legal needs of the time.

The strictures applied to the writ during the past decade have often been ascribed to federalism, comity, and the need for finality of judgment. But federalism and comity are not of recent vintage; they blossomed in the early years of the nation and have enjoyed a lively history ever since. The reasons underlying recent constriction of the writ may contain some elements of comity, federalism, and finality of judgment, but social and legal developments have added other ingredients to the mix. These include the almost uncontrollable torrent of prisoner and other habeas cases flowing into the

233. *Id.*

federal courts each year and the growing concern with the upsurge in violent crime. Repetitive and costly trials and seemingly endless litigation over a single criminal case have aroused impatience and indignation. The present Supreme Court may have concluded that changing concerns, a society frightened by growing lawlessness and crimes of violence, and an overworked judiciary necessitate stringent limitations of the writ. Only habeas petitions convincingly setting forth fundamental miscarriages of justice will be considered. And we can probably expect that for the remainder of the century the course of collateral review will continue to move restrictively and slowly.

Nonetheless, almost two hundred years after Congress first provided for habeas corpus relief in the Judiciary Act of 1789, the Great Writ continues today to hold a venerable and vibrant role in our jurisprudence. Despite the diminished availability of the writ, it still has considerable vitality. Essentially, it remains the bulwark of our personal liberties, far stronger than it was in the day when Edward Bushell used it to obtain his freedom from the Crown.